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No. 451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

ALLENTOWN BROADCASTING CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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December 17, 1954

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STATEMENT OF THE CASE

This case involves the assignment of a radio broadcasting station on the frequency 1230 kc. either to Respondent for operation at Allentown, Pennsylvania, or to Easton Publishing Company for operation in the neighboring town of Easton, Pennsylvania (R. 156). Respondent, a Pennsylvania corporation formed in 1945 for the purpose of seeking and operating a radio broadcasting station in Allentown, possesses all necessary qualifications as a radio station licensee. Its only activity is that of operating the assignment involved in the case[1] (R. 172). Easton Publishing Company (referred to herein as "Easton Company"), Respondent's rival applicant, is the owner and publisher of the *Easton Daily Express*, Easton's only newspaper, the licensee of FM radio broadcasting station WEEX, and the licensee of Easton's only television station, WGLV-TV (R. 165). Easton Company did not intervene in this appeal.

Allentown, the county seat of Lehigh County, has a population of 106,000 (immediately contiguous to the City of Bethlehem, 66,000 population) is some 14 miles southwest of Easton, population 35,000 (R. 163). Respondent's station, WHOL, does not provide service to Easton and the station sought by the Easton Company would not provide service to Allentown.

The applications involved in this proceeding were filed in the fall of 1945. Following the original hearing in May 1946, the FCC entered its first decision June 23, 1947 granting Respondent's application and denying that of the Easton Company. Appeal of that decision resulted in the lower Court's original judgment in this case *affirming* the

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[1] Under the FCC authorization granted to Respondent in June 1948, it constructed the station, which was placed in service September 3, 1948 and continuously operated since that date. The FCC in February 1949 granted Respondent a regular license for the operation of its station, WHOL, and this authorization has been continued in force pending final decision in this case (R. 157). Respondent's station WHOL renders a meritorious radio service and enjoys substantial public support (R. 210, 141, 108-122).

FCC decision in part and remanding the case for further findings. *Easton Publishing Company* v. *FCC*, 175 F. 2d 344, 351 (1949):

> "The case must be remanded for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need. Upon the other points at issue, the conclusions of the Commission are affirmed.
>
> "Remanded for further proceedings."

This remand was pursuant to the Court's holding on the original appeal that "The case involves a comparative consideration of two communities and of two applicants" (p. 346), and that the Commission's findings that "Allentown is in greater need of another radio station than Easton" (p. 348) was made independent of the " . . . comparative qualities, or of the lack of any particular type of service in either community, or of the greater ability of either applicant to meet that need" (p. 349).

Following the remand, FCC, in February 1950, denied pleadings of the two applicants for further findings of fact on the original hearing record and instead ordered a second hearing on all issues (R. 158). Efforts to forestall this action by mandamus petition being unsuccessful, *Easton Publishing Co.* v. *FCC*, 185 F. 2d 987 (1950), a second hearing was held in March, May and June of 1951 (R. 162). The Initial Decision of the trial examiner entered the following June 1952 proposed a grant of Respondent's application and a denial of the Easton Company's application (R. 53-147).

On a review of this Initial Decision of the trial examiner, the Commission, with two members not participating and one Commissioner dissenting, entered an order denying Respondent's application and granting that of Easton Company, in effect reversing the trial examiner's Report and the Commission's original decision (R. 156, 216). This second hearing decision of the Commission was reversed

by the Court below as predicated upon a conclusion contrary to and not supported by substantial evidence.

ARGUMENTS

The rationale of the FCC decision was that (1) on the Allentown *versus* Easton comparative aspect of the case " . . . there is little room for choice between the two communities"; and (2) on the *inter partes* comparative evaluations there are no significant differences between the relative abilities of Respondent and Easton Company or their respective radio service proposals (R. 211). Having thus reduced this then eight-year-old two-hearing case-proceeding to zero equivalence, the FCC chose to pivot its most recent decision in favor of the Easton Company on the " . . . one decisive factor" that Allentown was "afforded a choice between local standard broadcast programs and stations" whereas Easton, unless awarded another AM broadcast outlet, lacked such choice (R. 211-212).

The opinion of the Court below penetrates this decisional ground to the critical conclusion: the approximate equivalence of the two applicants and their service proposals. This key finding was held unsupported by substantial evidence "in the record as a whole—including the hearing examiner's Initial Decision." (Pet. p. 6a).

The Court's decision exposed three underlying defects deemed fatal to the order under review: (1) "Uncertainty as to programming plans"; (2) "Reluctance, evasiveness, lack of candor; and especially the monopoly point"; (3) "Monopoly and concentration of communications media."[2]

Petitioner now advances a novel theory contending that the Commission grounded its decision *solely* on the comparison between community needs, entirely irrespective of the *inter partes* comparative aspects of the case (Pet. pp.

[2] The Court's opinion contends that ". . . the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest." (Pet. p. 14a).

11, 13). By this new doctrine, the superior applicant and the greater merit of his radio service proposal become immaterial to Commission's award of a broadcast license. This startling thesis is now advanced despite the Court of Appeals' 1949 decision and the terms of its remand which directed further findings on precisely the issue of comparative qualifications of the rival applicants that the Government now disclaims as irrelevant, "extraneous" and "meaningless" under the law.[3]

Petitioner fundamentally misconceives the import of the decision below.

1. *The substantive question.* Whatever substantive merit there may be in the statutory interpretation first advanced in the pending Petition, the proposition was never at issue in this appeal. It was not a contention on behalf of the Petitioner before the lower court.[4] Neither is it a point of difference between the majority and the dissenting opinion in the Court of Appeals. The theory now advanced in the Petition appears at variance with what the FCC was required to do and what in fact was done in the further proceeding under remand of the first appeal. (See FCC Hearing Issues (3) and (5), R. 158-159). It departs from the evidentiary and ultimate findings in the FCC's decision,

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[3] The posture of this case on rehearing was correctly given in the trial examiner's Report (R. 127):

> "In the light of the remand of the Court of Appeals 'for findings upon the comparative needs of the communities for new radio service and the relative abilities of the applicants to serve the greater needs,' *consideration will be given not only to the needs of the respective communities but also to the relative abilities of the respective applicants to meet that need, as disclosed by their past deeds and future plans.*" (Emphasis added)

[4] The Commission's brief before the Court of Appeals stated (p. 6-7):

> "The Commission's decision contains detailed findings of fact as to . . . the applicants . . . and the proposed program service proposals of the applicants."

the greater bulk of which deal with the *inter partes* comparative consideration.[5]

If there is any basis for the charge in the Petition that the Court below was mistaken in what findings the Commission did or did not make, this of itself raises doubt as to deficiencies of the FCC's decision. For the basis for an agency's action " . . . must be set forth with such clarity as to be understandable," and the reviewing court may " . . . judge the propriety of such actions solely by the ground invoked by the Agency." *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 196; *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654. Hence Petitioner's present challenge to the decision below is wholly groundless, but for the suggestion that the Court did not comprehend the FCC's decision, or that it was incomprehensible.[6]

In any event, Petitioner has failed to reconcile its present contention with the express terms of the judicial remand to the agency on the first appeal in 1949. In the second hearing proceeding this mandate directed the FCC to make further findings upon the comparative needs of the two communities for the new radio service *and* (in the conjunctive) the relative abilities of the applicants to serve the greater need. The opinion of the Court on the first appeal expressly held that the FCC was in error in premising its decision upon inter-community needs dissociated from the *inter partes* consideration. Instead its holding in substance was that the needs of the communities related to the particular service proposals were in effect opposite sides

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[5] This issue was given as one of the FCC's reasons for ordering a second hearing (R. 45) "For, the record does not contain sufficient information upon which we can determine on a comparative basis the relative . . . ability of the applicants as presently constituted to meet such needs."

[6] Section 8(b) of the Administrative Procedure Act would seem to require that "findings and conclusions, as well as the reasons or basis therefor, upon all the material issuance of fact, law, or discretion presented on the record" be complete and in form and content which can readily be comprehended by the reviewing court.

of the same coin of the statutory standard "public interest, convenience or necessity." The FCC, having acquiesced in that holding and having urged before the Court below that its further proceeding was in conformity with the terms of the remand, can not now reverse its position and ask this Court in effect to review the Court of Appeals' 1949 judgment. The certiorari process should not be used to resolve belatedly discovered differences between a reviewing court and an agency as to what finding the agency did or did not make, or to entertain Petitioner's latent misgivings about the Court of Appeals' original decision in this case five years ago.

Whether foreclosed or not, the statutory interpretation now urged by Petitioner would substitute "slot machine" determinations for the administrative process, and is unsound. Under Petitioner's novel theory, the FCC in any contested AM-assignment between two communities would merely take a transmitter count—and then award the new facility to the community with fewer existing AM outlets. This would follow, under the Petitioner's contention, quite regardless of whether the application to serve that community favored was tendered by a substantially inferior applicant with a decidedly poorer public service proposal. As illustrated by the Commission's evident intention to award the here contested facility to the publisher of Easton's only newspaper which, in addition, occupies TV and FM channels in that city, factors such as local communications monopoly could not even be considered. Nor would the presence of other potent broadcasting communications media, such as television outlets, in any way count. The right of hearing would shrivel to an empty gesture. And Congressional authority vested in the Commission to apply the broad standard of public interest, convenience and necessity upon the rational interplay of facts and relative factors in support of a reasoned decision based on its expert judgment would be stultified. Above all, no legal foundation supports the current contention that the FCC *must* assign the contested facility to Easton because it had only one other AM radio broadcasting facility

—in utter disregard of qualitative factors determining which among rival applicants should be preferred as better qualified to fill a public need.[7]

Moreover, Section 307(b)—from which the Commission's peculiar assertion purportedly derives—is unique to the FCC, and its interpretation concerns no other administrative agency. In fact, its interpretation in this case is of minimal significance to the FCC itself. Section 307(b), at the present time and for several years, has not been a significant or controlling factor in any but a few proceedings. Of the three classes of broadcasting stations, [(1) AM or standard broadcast stations; (2) FM, or frequency modulation broadcast stations; and (3) the newer television, TV, broadcast stations], the distribution of two classes of assignments, FM and TV, was handled legislatively by adoption of nation-wide allocation plans. *FCC 12th Annual Report, 1946*, p. 16; *Peoples Broadcasting Company* v. *U. S.* 209 F. 2d 286 (1953); *Logansport Broadcasting Corporation* v. *U. S.*, 210 F. 2d 24 (1954); *FCC Rule 3.606 Table of Assignments*, listing the discrete channels assigned to particular communities, 1 R.R. 53:602. The possibility of a Section 307(b) hearing issue in any FM station case proceeding or in any TV station case adjudication is so improbable as to be non-existent. In the older standard broadcast band (550-1600 kc.) already overcrowded with 2,700 stations on its 95 channels, the case proceeding activity in this class of station is quite small and in only a fraction of such cases is Section 307(b) a factor.[8] At the

[7] The hollowness of the Commission's position may be illustrated by the fact that if the FCC decision were upheld and if the Easton Company thereafter applied to move the station from Easton to Allentown, the FCC would grant that removal routinely.

[8] The interpretation of Section 307(b) advanced in this Petition has only one precedent in 27 years of regulation. The first interpretation of Section 307(b) as favoring a grant of a second facility to the smaller of two rival communities had its origin in *Northwestern Ohio Broadcasting Corp.*, 3 R. R. 1945 (1948), aff'd per curiam; *Sky Way Broadcasting Corp.* v. *F.C.C.*, 9 176 F. 2d 951 (1949).

present time, the major activity of the FCC in the broadcast field is in television. During the first eleven months of 1954, the FCC issued ten broadcast decisions in contested cases, eight of which were television, and two standard broadcast cases. None involved a Section 307(b) issue. (Pike & Fischer, R.R. Vol. 10/11)[9]

2. *The "substantial evidence" question.* The lower Court's opinion represents routine application of the substantial evidence rule as given in *Universal Camera Corporation* v. *NLRB*, 340 U. S. 474 (1951). Consideration of the trial examiner's Report, and the part thereof predicated upon demeanor evidence is relied upon only as bearing upon the question of substantial evidence. The lower Court would have been in error had it failed to take into consideration, on review of this substantial evidence question, the division between the trial examiner and the FCC (as well as the FCC member's dissent).

First it may be observed that this point has to do with the lower Court's review of the evidence and its interpretation. But the asserted misapplication of the "substantial evidence" rule is only secondarily involved because the charge is directed not at findings which are defended in the Petition, but as to matters which the Petitioner states the "court below . . . mistakenly thought was a finding." (Pet. p. 11). It also states as to such matter that "the Commission not only did not make such a finding but specifically refused to do so." It would seem, therefore, that if, as now contended by Petitioner, no finding was made on the *inter partes* considerations of the case, it is quite irrelevant to inquire whether findings which were not made are or are not supported by substantial evidence. Moreover, all of the matters to which the substantial evidence question is directed, have no relevance to the inter-community aspect of

[9] If *In re Gulf Beaches Broadcasting Co.* is considered as a Section 307(b) case, the FCC decided it on the *inter partes* considerations, and not on the inter-community aspect, contrary to the contention in this Petition. 11 R. R. ——. (Nov. 29, 1954).

the case which Petitioner asserts was the sole ground of decision.

The FCC has previously been enjoined by the lower Court, in which is conferred exclusive jurisdiction over radio appeals decisions, not to "ignore a material difference between two applicants." *Johnston Broadcasting Company* v. *FCC*, 175 F. 2d 351, 357 (1949).

> "It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases."

Significant differences between Respondent and Easton Company relevant to the hearing issues in this case, which the FCC decision glossed over or superficially reduced to zero equivalence, (or refused to make any findings on as now asserted) are outlined below.

Uncertainty as to programming plans. The trial examiner found as to the radio service proposal of Easton Company that " . . . the evidence in this proceeding is not at all clear as to the program service which it would actually render in the event of a grant of its application" (R. 142). Upon a consideration of all of the evidence submitted by the Easton Company on this subject, the examiner's Report concluded "that this record does not disclose with the required certainty the program service which would be rendered by the proposed station at Easton in the event of a grant of the application of the Easton Publishing Company" (R. 143). This left the *inter partes* issue balanced decidedly in favor of Respondent, for, as stated in *Plains Radio Broadcasting Company* v. *FCC*, 175 F. 2d 359, 362 (1949); "How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known."

FCC case proceedings have evolved some twenty-six factors for comparative evaluation in broadcast applications (2 Pike & Fischer, R.R. M-1451), two of which are "programming" and "operating plans." Deficiencies in the

preparation of the proposal of one applicant is a factor to be considered in contrast with a superior proposal of the other applicant. *Southern Tier Radio Service, Inc.*, (Initial Decision) 11 R.R. 143 (1954); *WJR, The Goodwill Station*, 9 R.R. 227, 260e (1954); *Tampa Times Company*, 10 R.R. 77, 136 (1954).

The Easton Company in the original 1946 hearing proposed network programs for 63% of the time (R. 142). When the second hearing was ordered in 1950, provision was made for the amendment of the five-year old applications to bring them up to date (R. 47) and the parties were put on notice to disclose any and all changes in present plans (R. 129). Easton Company questioned the propriety of the provision for amendment of applications (R. 52) and chose deliberately not to amend its application as to program service (R. 160, 195). Easton Company's evidence in the 1951 hearing omitted any network program as well as any explanation as to its change of position between the two hearings. The witness for the Easton Company was examined on this evidence by Respondent's counsel, by FCC counsel and by the presiding officer, resulting in the admission that the Easton Company, if successful, would probably seek a network affiliation (R. 102-104). This admission contrasted with the network proposal in the original hearing left the Easton Company's 1951 radio proposal, at least 63% of it, uncertain. The evidence shows other relative uncertainties. Most of the so-called public service programs were not supported by testimony of representatives of any group that such groups would actually participate in the program proposals (R. 139). The evidence also bears out that to a substantial degree the Easton Company's program service of its FM station WEEX was at variance with the radio service proposals represented to the FCC for the grant of that licensee. Even taking the Easton Company's program evidence at face value, the FCC decision finds "Many of the local programs proposed to be broadcast by the Easton applicant are similar in a gen-

eral way to programs now broadcast by station WEST" (the existing AM broadcasting station in Easton) (R. 199, See R. 105-107).

Reluctance, evasiveness, and lack of candor. The trial examiner concluded " . . . there are serious questions with respect to the reliance which can be placed upon the management of the Easton applicant to operate the requested station in the manner represented, especially with respect to program service (R. 146). Elsewhere the trial examiner's Report with regard to the Easton Company's program evidence, states: "... the applicant has not made the frank, candid and honest disclosures on this and other subjects which the Commission has a right to expect of an applicant" (R. 143-144). The "several instances" of the Easton Company's witnesses' lack of candor and evasiveness were "considered separately and apart from the general context of the testimony" (R. 145) and in the aggregate deemed significantly substandard in forthrightness. *United States* v. *WOKO*, 329 U.S. 227 (1946).

No one can seriously contend today that in case adjudication proceedings no consideration will be given to demeanor evidence. This Court in *Universal Camera Case, supra,* quoted with approval from the Final Report of the Attorney General's Committee: " '. . . on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.' " Indeed it would be artificial and fictional to rule out the consideration of demeanor evidence in agency case proceedings. The vesting of judicial function in agencies conditioned upon the conduct of a case proceeding for the "reception of the evidence" must import from judicial experience the influence to be given demeanor evidence in the decisional process. Cf. *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (2d Cir., 1952);[10] *Morgan* v. *U. S.*, 298 U.S. 468, 481 (1936); *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484 (2d Cir., 1952). Demeanor evidence comes

into consideration only in the presence of the presiding officer and disappears when the witness steps down. The shifting of the hearing function from the agency to the trial examiner[11] necessarily carries with it the responsibility of considering and judging demeanor evidence. The court in *Dyer* v. *MacDougall, supra* stated:

> "He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was."

A cold hearing cannot recreate the actual hearing situation. It must be directly experienced. It cannot be simulated by the print of words on a page anymore than by the reproduction of characters in Braille. The search for truth is best left to him who directly experienced the actual hearing situation. "The voice is Jacob's voice, but the hands are the hands of Esau." No printed record could resolve that identity conflict.

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[10] "It is true that the carriage, behavior, bearing, manner and appearance of a witness—in short his 'demeanor'—is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

[11] During the first 11 months of 1954, the FCC's trial examiners entered 68 Initial Decisions in broadcast cases (88 total). The FCC itself conducted no broadcast hearing and entered 10 contested decisions on review of trial examiner reports.

Monopoly and concentration of communications media. One of the more significant points of comparison between rival applicants is the issue of monopoly or competition. Radio broadcasting being a competitive activity, public interest is generally considered best served by preferring the application which tends to promote competition. With other factors being substantially equal, there is a somewhat consistent pattern of avoiding concentration of control in the same entity of mass media communications, particularly in the same community. *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677 (1951). Easton Company is the owner and publisher of the only newspaper in Easton. It has survived two efforts of competition in this field (R. 165, 170). It is the licensee and operator of Easton's only TV station (which was authorized six months prior to the FCC's decision in this case). Since 1948 it has been the licensee and operator of FM radio station WEEX. Easton Company's only competition in Easton is from radio station WEST-FM/AM. A grant of the Easton Company's application would not promote competition but give it a facility for use in the only service in which it does not enjoy exclusivity. The evidence discloses various practices of the Easton Company which are restrictive and not up to licensee standards. Easton Company refused to publish the radio programs of the Easton station WEST from 1936 to 1948, a practice which was abandoned only after coming under FCC jurisdiction as the grantee of FM station WEEX. There is evidence that the Easton Company has continued to exclude or minimize publicizing activities otherwise newsworthy involving station WEST (R. 133). Published charges against the Easton Company that it would not print stories unless given a "beat" were left unexplained (R. 294).

The three factors above reviewed are considered in the lower Court's opinion not as findings which are *per se* unlawful but as illustrations of substantial evidence relied upon to unmask the erroneous FCC findings of equivalence between the relative abilities of Respondent and Easton

Company and between the comparative merits of their radio service proposals.

All of the above three factors pertain to *inter partes* matters on which Petitioner now contends the FCC made no findings and the lower Court's understanding to the contrary was mistaken. This contention would seem to remove the substantial evidence issue. In any event, the trial examiner's function on demeanor evidence in relation to the agency[12] is germane only to one of the above three factors and all are secondary to the question of substantial evidence. Cf. *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.*, 191 F. 2d 786 (Cir. 7th 1951), cert. dismissed; *Boeing Airplane Co.* v. *N.L.R.B.*, — F. 2d — (9th Cir., Sept. 23, 1954), 4 Pike & Fischer, Ad. L. (2d) 575.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below was correct, that no issue of general public significance appears, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 17, 1954

[12] The lower Court's opinion is written by J. Bazelon who wrote the dissenting opinion in that Court's earlier decision in *Ramspeck* v. *Federal Trial Examiners Conference*, 202 F. 2d 312 (1952), Reversed, 345 U.S. 128.